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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/518,812	10/11/2005	Guido F. Smoorenburg	22409-00281-US	3611
27510	7590	11/10/2010	EXAMINER	
KILPATRICK STOCKTON LLP			HOLMES, REX R	
1100 Peachtree Street				
Suite 2800			ART UNIT	PAPER NUMBER
ATLANTA, GA 30309			3762	
			NOTIFICATION DATE	DELIVERY MODE
			11/10/2010	ELECTRONIC

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

ipefiling@kilpatrickstockton.com  
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<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/518,812	SMOORENBURG, GUIDO F.	
	<b>Examiner</b>	<b>Art Unit</b>	
	REX HOLMES	3762	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 09 December 2009.  
 2a) This action is **FINAL**.                    2b) This action is non-final.  
 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 1 and 39-71 is/are pending in the application.  
 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
 5) Claim(s) 1,51-66 and 71 is/are allowed.  
 6) Claim(s) 39-50 and 67-70 is/are rejected.  
 7) Claim(s) \_\_\_\_\_ is/are objected to.  
 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.  
 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) <input type="checkbox"/> Notice of References Cited (PTO-892)	4) <input type="checkbox"/> Interview Summary (PTO-413)
2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)	Paper No(s)/Mail Date. _____ .
3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date <u>3/17/10; 8/5/10</u> .	5) <input type="checkbox"/> Notice of Informal Patent Application
	6) <input type="checkbox"/> Other: _____ .

## **DETAILED ACTION**

### ***Claim Rejections - 35 USC § 101***

1. Claims 39-50 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter. The claim appears to be combining two statutory classes. The preamble states that the claim is an apparatus claim, while the body of the claim is directed toward a method.

### ***Claim Rejections - 35 USC § 112***

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claims 39-50 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

4. Claim 39 recites steps performed by an apparatus but fails to provide any elements in the device to perform the steps. It is unclear what element in the apparatus performs each of the steps. It is suggest to include device elements to perform each of the steps listed in the claim.

### ***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

6. Claims 1-4, 7-14, 20-24, 27-34 and 38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Faltys et al. (U.S. Pat. 6,157,861 hereinafter “Faltys 861”) in view of Faltys et al. (U.S. Pat. 6,289,247 hereinafter “Faltys 247”).

7. Regarding claims 67-70, Faltys 861 discloses a method for fitting a cochlear implant with multiple channels that includes establishing an initial current using action potentials, and then adjusting the levels to conform to the comfort levels of the patient (e.g. Abstract, Figs. 3A-3B, Cols. 3-4). Faltys 861 further discloses that the stimulator can be connected to a clinicians computer for direct interface between the clinician and the speech processor (e.g. Col. 7, 48-65; Col. 9, line 65 to Col. 10, line 7). Faltys 861 discloses that the initial current level is established based on the measured action potentials (e.g. Col. 11, ll. 38-48).

8. Regarding claims 67-70, Faltys 861 discloses the claimed invention but fails to disclose obtaining a response for a plurality of channels and adjust the current level setting for a plurality of channels. However, Faltys 247 discloses a multi-channel stimulator that establishes a speech strategy that is comprised of the polarity, magnitude, location (which electrode pair receives the stimulation current), and timing (when the stimulation current is applied to the electrode pair) of the stimulation current that is generated by the ICS (Col. 9, ll. 51-54) and adjusts based on all channels or a subset of channels (Col. 32, ll. 27-36). It then takes the speech processing strategy which contains the stimulation information for each channel in the array and supplies stimulation to the array based on the values of the initial stimulation strategy, it then receives a feedback signal in response to the initial stimulation, it then adjusts the

stimulation channels until the patient senses audio signals correctly (Col. 4, ll. 14-36; Col. 21, line 33 to Col. 22, line 29). It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the individual adjustment system as taught by Faltys 861, with the combined sensing and adjusting of the parameters for a plurality of channels as taught by Faltys 247, since such a modification would provide the predictable results of optimizing, automating and accurately setting the implant parameters without the need for patient feedback.

***Allowable Subject Matter***

9. Claims 1, 51-66 and 71 are allowed.
10. The following is a statement of reasons for the indication of allowable subject matter: The subject matter for the independent claims could not be found or was not suggested in the prior art. The subject matter not found was adjusting the current level settings to effectuate a tilt of the first current level profile about a pivot point on the first current level profile in combination with the other limitations of the claim.

***Response to Arguments***

11. Applicant's arguments with respect to claims 67-70 have been considered but are moot in view of the new ground(s) of rejection.
12. Although, prior art rejection is not made for claims 39-50, these claims are not objected to as allowable due to the pending 101 and 112 rejections.

***Conclusion***

13. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP

§ 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to REX HOLMES whose telephone number is (571)272-8827. The examiner can normally be reached on M-F 9:00 - 5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Niketa Patel can be reached on (571) 272-4156. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/R. H./  
Examiner, Art Unit 3762  
/Niketa I. Patel/  
Supervisory Patent Examiner, Art Unit 3762